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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 463

HANS ELLIOT AND UNITED STATES FIDELITY AND GUARANTY COMPANY, PETITIONERS AND APPELLANTS BELOW,

vs.

THOMAS R. LOMBARD, RESPONDENT AND APPELLEE BELOW.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

J. ZACH. SPEARING,
Whitney Building, New Orleans, La.;
WM. A. VAN SICLEN, and
MERRITT BARTON,
Box 124, Ancon, Canal Zone,
Of Counsel.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

1. That Thomas R. Lombard, as owner of Sand Barge No. 4584, filed a libel *in rem* and *personam* in the United States District Court for the District of the Canal Zone on the 9th day of August, 1930, against the Motorship "REAL" and Hans Elliot, in a cause civil and maritime for damages

for a collision in the waters of the Canal Zone on the 31st day of July, 1930 (R. 3).

2. That thereafter, and on the 13th day of August, 1930, Hans Elliot claimed the said Motorship "REAL" (R. 19) and thereupon entered into a stipulation with the libelant for the release of said Motorship "REAL" (R. 19).

3. That, pursuant to such stipulation, Hans Elliot, your petitioner, executed a "Release Bond" in the sum of $10,000, whereon the United States Fidelity and Guaranty Company signed as surety (R. 20).

4. That trial of the matter was had on the 24th day of July, 1931, the Honorable James J. Lenihan, United States District Judge for the District of the Canal Zone, presiding (R. 62).

5. That on the 13th day of August, 1932, Judge Lenihan rendered his opinion and on the 27th day of August, 1932, entered a decree in favor of the libelant, Thomas R. Lombard, and against the claimant, Hans Elliot, awarding the libelant damages in the sum of $6,321.29 (R. 97). By such decree it was:

> (a) "Ordered, adjudged and decreed, that the libelant herein do have and recover from the respondent herein the sum of $6,321.29, with interest thereon at the rate of 6% per annum from the 31st day of July, 1930, together with the libelant's costs taxed in the sum of $117.20, with interest thereon until paid;"
>
> (b) "Ordered, adjudged and decreed, that unless this decree be satisfied or an appeal taken within ten days after service of a copy of this decree with notice of entry upon the respondent or his proctor, execution issue against Hans Elliot, respondent, and the United States Fidelity and Guaranty Co., his stipulators for costs and value, their goods, chattels and lands to satisfy this decree;"

(c) "Ordered, adjudged and decreed that the cross-libel herein be dismissed at cross-libelant's costs" (R. 98).

6. On the 10th of September, 1932, and within ten days from service of notice of the entry of the said decree, Hans Elliot, respondent, filed a petition for appeal to the United States Circuit Court of Appeals for the Fifth Circuit, together with his assignment of errors (R. 99), which petition was allowed (R. 101).

7. The appeal to the United States Circuit Court of Appeals for the Fifth Circuit having been perfected, the appellee, Thomas R. Lombard, did, on the 19th day of April, 1933, file in the United States Circuit Court of Appeals for the Fifth Circuit a "Motion to Dismiss the Appeal" on the grounds that the United States Fidelity and Guaranty Company, surety upon claimant's release bond, had not been made a party to the appeal or that a severance had not been made (R. 477). No argument was had on such motion.

8. Thereafter, on April 22, 1933, the United States Fidelity and Guaranty Company, the surety on the release bond above mentioned, voluntarily appeared in the United States Circuit Court of Appeals for the Fifth Circuit and moved for leave to join with the appellant, Hans Elliot, in prosecuting the appeal, expressly waiving issuance and service of citation. At the same time, Hans Elliot moved for leave to amend his appeal to include the surety company as a party appellant. No argument was had on either of above motions.

9. On the 4th day of August, 1933, the said United States Circuit Court of Appeals for the Fifth Circuit entered a decree dismissing the appeal on the grounds that the failure of the surety on release bond to be made a party was fatal and required dismissal (R. 490). From such holding,

Judge Samuel H. Sibley dissented and rendered a separate opinion (R. 491).

10. By its decision, the United States Circuit Court of Appeals for the Fifth Circuit holds that in an admiralty appeal, sureties upon the bond for release of a vessel seized under libel are necessary parties to the appeal; that such sureties cannot be made parties of record even by appearing voluntarily after the time has expired for perfecting the appeal; that the judgment entered by the district court in the matter at bar was a joint judgment from the time of its rendition, against the surety equally as against Hans Elliot.

Reasons relied upon for granting petition for certiorari to the United States Circuit Court of Appeals for the Fifth Circuit are as follows:

(A) The decision of said circuit court of appeals as to the necessity of sureties upon an admiralty stipulation being made parties to an appeal is in conflict with the decision of the Circuit Courts of Appeal for the Second, Fourth, Sixth and Ninth Circuits, on the same matter, in the cases of *The Lydia*, 1 Fed. (2) 18 (C. C. A. 2); *The Buckhannon*, 299 Fed. 519 (C. C. A. 2); *The Cartona*, 297 Fed. 827 (C. C. A. 2); *The Glide*, 72 Fed. 200 (C. C. A. 4); *The New York*, 104 Fed. 561 (C. C. A.); and *Perrian v. Pacific Coast Company*, 133 Fed. 140 (C. C. A. 9), and is a decision of an important question of general law.

(B) The decision of said circuit court of appeals denying the right of a surety to join voluntarily in an appeal prior to hearing in such court is in conflict with the weight of authority.

(C) The decision of said circuit court of appeals, holding that the decree entered by the district court was joint and

effective against the surety as of the date of its entry as it was against the appellant, is an erroneous decision of an important question of general law.

WHEREFORE your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding such court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals for the Fifth Circuit had in the case numbered and entitled on its docket: "No. 6816. Hans Elliot, Claimant, Appellant, *v.* Thomas R. Lombard, Appellee," to the end that this cause may be reviewed and determined by this Court as provided for by Section 347 of Title 28, U. S. C., Judicial Code Sec. 240 as amended, and that the judgment herein of the United States Circuit Court of Appeals for the Fifth Circuit be reversed by this Court, and that such other and further relief be had as to this Court may seem proper.

Dated ——— , 1933.

HANS ELLIOT and
UNITED STATES FIDELITY AND GUARANTY COMPANY,
Petitioners,

By J. ZACH. SPEARING,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit in this case was rendered on the 4th day of August, 1933 (R. 490).

II.

The date of the decree dismissing appeal, to be reviewed, is August 4, 1933 (R. 497).

III.

Jurisdiction.

The statutory provision which is believed to sustain the jurisdiction of this Court is Section 240 of the Judicial Code as amended (U. S. C., Title 28, Section 347) (Appendix 1), providing for petition for certiorari to circuit courts of appeal. Under the above law we invoke the jurisdiction of this Court on the ground that it is of great public importance to have the highest authority resolve the conflict now existing as to the necessity of sureties upon admiralty stipulation for the release of vessels seized under process, *in rem* being made parties to an appeal to the circuit court of appeals from the district court. It was held in this case by the United States Circuit Court of Appeals for the Fifth Circuit that such sureties were necessary parties to the appeal (R. 490), contrary to decisions rendered on the same questions by the Circuit Courts of Appeal of the Second, Fourth, Sixth and Ninth Circuits.

IV.

Statement of the Case.

This has already been stated in the preceding petition under "I" (pp. 1-4), which is hereby adopted and made a part of this brief.

V.

Specification of Errors.

1. The circuit court of appeals erred in holding that the United States Fidelity and Guaranty Company was a necessary party to the appeal.

2. The circuit court of appeals erred in refusing to allow the United States Fidelity and Guaranty Company to be made a party appellant upon its voluntary appearance in the appellate court, waiving the issuance and service of citation.

3. The circuit court of appeals erred in holding that the decree entered by the district court was joint and effective against the surety as of the date of its entry as it was against the appellant, Hans Elliot.

VI.

ARGUMENT.

Summary of Argument.

POINT A. We propose in Point A to discuss the conflicts existing between other circuits and authorities and the Fifth Circuit as to the necessity of sureties upon an admiralty release bond being made parties to an appeal.

POINT B. We propose in Point B to discuss the right of a surety to join voluntarily in an appeal even after the time for perfecting an appeal has expired.

Point C. We propose in Point C to discuss the effect of a decree such as was entered by the lower court in the instant matter, with special emphasis on its effect upon a surety prior to the time when by its terms such decree operates against a surety.

Point A.

Contracts. The Fifth Circuit Court of Appeals in the instant matter dismissed the appeal of Hans Elliot for the reason that the surety, United States Fidelity and Guaranty Company, was not made a party to the appeal, was not asked to join in the appeal, and there had been no summons or severance.

The court itself, speaking of the motion to dismiss, says:

> "On questions presented by the above motions the decisions are not harmonious, particularly with regard to admiralty stipulations for the release of vessels" (R. 492).

Benedict on Admiralty, Vol. 1, 5th ed., at page 642, states:

> "All parties against whom a decree is rendered should join in the appeal, or the record should show that those who have not joined have had notice of the taking of the appeal and have either refused or neglected to join. But sureties on a stipulation are not parties and need not join."

Cyclopedia of Federal Procedure, Section 2745, at page 159 of Vol. 6, states:

> "It being settled law that an admiralty appeal brings up the whole case *de novo*, vacating thereby the decree below, it is unnecessary that any but one party or claimant take an appeal, which operates for all, so that non-appearing parties are no longer bound by the decree below."

Vol. 1, *Corpus Juris*, 1346, Section 298, states:

> "Sureties appearing on the record may appeal, but they are not necessary parties to an appeal by a party to the record, unless some extraneous question arises involving their obligation on their bond or stipulation."

The Fifth Circuit stands alone in its requirement that the sureties upon a stipulation for the release of a vessel be made parties to an appeal.

> "Sureties on a stipulation are not parties to the record. When a vessel is attached by proceedings in rem, the owner, or some one on his behalf, filed his claim to her, and thence forward becomes a party to the record, and conducts and controls the defense. * * * But sureties in the stipulation do not become parties." *The Glide*, 72 Fed. 202 (C. C. A. 4.)
>
> "Such a bond is not a mere personal security given to the plaintiff, but security given to the court. It is a pledge or substitute for the property proceeded against, and the sureties are not parties to the suit, or entitled to interfere in any way with the management of the suit. Unless some extraneous question arises involving the scope or obligation of the sureties in such bond, they are not necessary parties to an appeal taken by any of the parties to the record." *The New York*, 104 Fed. 564 (C. C. A. 6.)
>
> "Sureties to such a stipulation are not parties to the controversy. The claimant alone conducts and controls the defense." *Perrian* v. *Pacific Coast Co.*, 133 Fed. 142 (C. C. A. 9.)
>
> "The appearance of the stipulator as an intervenor cannot be recognized. The only difference in this regard between this case and that of *Paulsen* v. *The Cartona* (C. C. A. —) 297 Fed. 827, is that the stipulator himself was permitted to intervene in this cause, instead of those who had given cross-security to the stipulator. It is just as true in this instance as it

was in that of the case cited that the stipulator had no interest in the *res*, and therefore cannot be permitted to appear as an intervenor." *The Buckhannon*, 299 Fed. 519, at p. 520 (C. C. A. 2.) *The Lydia*, 1 Fed. (2) 18.

In the case of *The Lydia*, 1 Fed. (2) 18, p. 21 (C. C. A. 2), where a judgment in form similar to the one at bar was entered, the court denied the right of the stipulator to become a party.

Point B.

The appellate court refused to allow the United States Fidelity and Guaranty Company to be made a party to the appeal upon its voluntary appearance before the hearing, expressly waiving issuance and service of citation, and denied the motion of Hans Elliot to amend his appeal so as to make the Uinted States Fidelity and Guaranty Company a party to the appeal.

Such an amendment was allowed by this Honorable Court, without opinion, in the cases of *Inland & Seaboard Coasting Co.* v. *Tolson*, 136 U. S. 572, 34 L. Ed. 539; also in *Knickerbocker Life Insurance Company* v. *Pendleton*, 112 U. S. 696, at page 710, 28 L. Ed. 866.

> "It would appear to be settled that this court, under the provisions of Sec. 1005, Rev. St. U. S. (Appendix 2) above mentioned, has the power to allow an amendment such as the one moved for in this case, although thereby an additional party is inserted in the writ of error and the citation, and although at the time the amendment is allowed the period within which the writ of error should have been sued out from the original judgment has elapsed." *Gilbert* v. *Hopkins* (C. C. A. 4) 198 Fed. 849, at page 850.

A similar motion to amend by adding a co-defendant in error was granted and motion to dismiss denied without

discussion in *Rininger* v. *Puget Sound Electric Ry.* (C. C. A. 9), 220 Fed. 419.

Similar motions were granted by the Circuit Court of Appeals for the Fifth Circuit in *The Seguranca*, 250 Fed. 19, and *The Mary B. Curtis*, 250 Fed. 9, and by the Circuit Court of Appeals for the Fourth Circuit in *Browning* v. *Boswell*, 209 Fed. 788 (C. C. A. 4), in which case the court said, after holding it had discretionary power to make the order for amendment, at page 791:

> "It is equally clear that in the present instance the discretion ought to be exercised and the motion granted. There has been no lack of diligence, but at most a misapprehension by counsel as to a question of practice, and the motion is made to meet the objection urged by the appellees that the appeal can not be prosecuted without citation of the creditors. The appellees will not be delayed or otherwise prejudiced and the bringing in of the creditors as parties to the appeal by issuing the citation to them will have the good effect of entirely eliminating from the record a serious technical question, and leaving the case to be decided on its merits."

Point C.

The circuit court held the judgment rendered in the district court to be joint.

As said by Judge Samuel H. Sibley in his dissenting opinion (R. 494-495), and which opinion we put forth in support of our petition:

> To me this decree seems on its face evidently not joint, but that the only effective parts of it are against Elliot alone, the respondent below. There are three distinct judgments in separate paragraphs. The first is: 'Ordered, adjudged and decreed that the libellant do have and recover of the respondent' certain sums. This is the decree in the original cause. The surety, United States Fidelity & Guaranty Company, is not

mentioned in it. The second is: 'It is further ordered, adjudged and decreed that unless this decree be satisfied or an appeal taken within ten days after service of a notice of entry upon the respondent or his proctor, execution issue against Hans Elliot, respondent, and United States Fidelity and Guaranty Company, his stipulators * * * to satisfy this decree.' This is the summary judgment on the stipulation which by the provision of 28 U. S. C. A., Sec. 754, 'may be recovered at the time of rendering the decree in the original cause.' It is not the same thing as the decree in the original cause, though often included in it, but is an additional judgment on the stipulation, gotten against the parties to it without additional proceedings therefor. The third judgment is: 'Ordered, adjudged and decreed that the cross-bill be dismissed.' United States Fidelity & Guaranty Company is a party to the second of these judgments only, and that judgment is but provisional. For it to be made operative there must be proof of service of a notice on the respondent or his proctors of the rendition of the first judgment and proof of the lapse of ten days thereafter without payment or appeal, consideration of which would perhaps require further judicial action. But in fact there was an appeal within ten days, so that by its own terms this judgment never became operative. There was nothing for the United States Fidelity & Guaranty Company to appeal from. It was not, however, discharged from its stipulation, for if its condition be looked to it shows an obligation to 'pay the money awarded by the final decree rendered by the court of the appellate court if any appeal intervenes.' A summary judgment can be entered on the stipulation so soon as a truly final decree in the cause is had, although rendered on a mandate from this court. A joint decree might have been made on the trial below, but it was not."

"The condition of the appeal bond is that the appellants shall pay the damages and costs which shall be awarded against them by this court, as appellants, if they shall fail to make their appeal good. The appel-

lants are not under obligation to pay the sum awarded against them by the decree until the time when execution can issue on the decree, which is not until the expiration of ten days after the rendering of the decree. The obligations of the sureties being an obligation only that the appellants shall pay when obliged to pay, cannot be enforced against them in any manner, even to the extent of entry of judgment against them, until the obligations of the appellants to pay comes into force; and such obligation of the appellants does not, in a case like the present, where the appeal may be a supersedeas, come into force until the expiration of ten days after the rendering of the decree." The New Orleans, 18 Fed. Cas. No. 10,181, 17 Blatchford 216.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

J. ZACH. SPEARING,

Counsel for Petitioners.

WM. A. VAN SICLEN and MERRITT BARTON,

Of Counsel.

APPENDIX I.

SECTION 347. (Judicial Code, Section 240, amended.) Certiorari to circuit courts of appeals and Court of Appeals of District of Columbia; appeal or writ of error to Supreme Court from circuit courts of appeals in certain cases; other reviews not allowed. (*a*) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

(*b*) Any case in a circuit court of appeals where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against its validity, may, at the election of the party relying on such State statute, be taken to the Supreme Court for review on writ of error or appeal; but in that event a review on certiorari shall not be allowed at the instance of such party, and the review on such writ of error or appeal shall be restricted to an examination and decision of the Federal questions presented in the case.

(*c*) No judgment or decree of a circuit court of appeals or of the Court of Appeals of the District of Columbia shall be subject to review by the Supreme Court otherwise than as provided in this section. (Mar. 3, 1891, c. 517, Section 6, 26 Stat. 828; Mar. 3, 1911, c. 231, Section 240, 36 Stat. 1157; Feb. 13, 1925, c. 229, Section 1, 43 Stat. 938.)

APPENDIX II.

SECTION 873. Amendment of writ of error. The Supreme Court may, at any time, in its discretion and upon such terms as it may deem just, allow an amendment of a writ

of error, when there is a mistake in the teste of the writ, or a seal to the writ is wanting, or when the writ is made returnable on a day other than the day of the commencement of the term next ensuing the issue of the writ, or when the statement of the title of the action or parties thereto in the writ is defective, if the defect can be remedied by reference to the accompanying record, and in all other particulars of form: Provided, The defect has not prejudiced, and the amendment will not injure, the defendant in error (R. S. Section 1005).